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6 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 JAY EDISON WALLACE and LANA
9 WALLACE,

10 Plaintiffs,

11 v.

12 ISLAND COUNTY, MICHAEL HAWLEY,
and JOHN DOES 1-4,

13 Defendants.
14

No. C09-0823RSL

ORDER DENYING PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY
JUDGMENT AND GRANTING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

15 This matter comes before the Court on "Defendants' Motion and Memorandum
16 for Summary Judgment" (Dkt. # 58) and "Plaintiffs' Motion for Partial Summary Judgment to
17 Vacate the Labor Arbitration Decision" (Dkt. # 83). In their First Amended Complaint,
18 plaintiffs allege claims of negligence, breach of implied covenants, public record act violations,
19 civil rights violations, arbitration award procured by fraud/misconduct, tortious interference,
20 intentional and/or negligent infliction of emotional distress, and defamation and false light.
21 Dkt. # 49. Plaintiffs have moved to vacate the labor arbitration decision, while defendants seek
summary judgment on all of plaintiffs' claims.

22 Summary judgment is appropriate if there is no genuine dispute as to any material
23 fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The
24 moving party bears the initial burden of demonstrating the absence of a genuine issue of
25 material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Where the moving party will
26

1 have the burden of proof at trial, it must affirmatively demonstrate that no reasonable trier of
2 fact could find other than for the moving party. Calderone v. United States, 799 F.2d 254, 259
3 (6th Cir. 1986). On an issue where the nonmoving party will bear the burden of proof at trial,
4 the moving party can prevail merely by pointing out to the district court that there is an absence
5 of evidence to support the non-moving party's case. Celotex Corp., 477 U.S. at 325. If the
6 moving party meets the initial burden, the opposing party must set forth specific facts showing
7 that there is a genuine issue of fact for trial in order to defeat the motion. Anderson v. Liberty
8 Lobby, Inc., 477 U.S. 242, 250 (1986). The Court must view the evidence in the light most
9 favorable to the nonmoving party and draw all reasonable inferences in that party's favor.
10 Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 150-51 (2000).

11 The production of "a scintilla of evidence in support of the non-moving party's
12 position" is not sufficient to create a genuine issue of material fact, however. Triton Energy
13 Corp. v. Square D Co., 68 F.3d 1216, 1221 (9th Cir. 1995). Nor may hyperbole, supposition,
14 or conclusory accusations substitute for actual evidence. CarePartners LLC v. Lashway, 2010
15 WL 1141450 (W.D. Wash. 2010) (citing British Airways Bd. v Boeing Co., 585 F.2d 946, 955
16 (9th Cir. 1978)). The production of a stack of uncited documents in opposition to or in support
17 of a motion for summary judgment does not satisfy a party's burden. The Court need not, and
18 will not, "scour the record in search of a genuine issue of triable fact." Keenan v. Allan, 91
19 F.3d 1275, 1279 (9th Cir. 1996); see also, White v. McDonnell-Douglas Corp., 904 F.2d 456,
20 458 (8th Cir. 1990) (the court need not "speculate on which portion of the record the
21 nonmoving party relies, nor is it obliged to wade through and search the entire record for some
22 specific facts that might support the nonmoving party's claim").¹

23 ¹ Plaintiffs have consistently failed to provide pin-point citations to the record in violation of
24 Local Civ. R. 10(e)(6). Dkt. # 83 at 2-8, 9, 15-17; Dkt. # 80 at 5-11, 15-17, 21-25, 31, 34-35. In
25 addition, many of plaintiffs' basic factual contentions are based solely on citations to the narrative of
26 events provided by Deputy Wallace. Dkt. # 72. This reliance on mostly inadmissible evidence has
made it very difficult to determine whether a genuine issue of material fact exists because the majority
of the statements in Deputy Wallace's declaration are not based on personal knowledge of the events
he describes. The Court has spent an inordinate amount of time hunting through the voluminous
record in an attempt to find the evidentiary basis for plaintiffs' factual contentions.

On September 6, 2011, the Court heard oral argument. The Court subsequently ordered the parties to file proper declarations that comply with the Federal Rules of Evidence and to provide additional briefing on discrete issues. Dkt. # 109. Having considered the memoranda, declarations, and exhibits submitted by the parties, having heard the arguments of counsel, and taking the facts in the light most favorable to the non-moving parties, the Court finds as follows:

BACKGROUND

In July 2005, Sheriff Michael Hawley² announced that he would not run for another term as Sheriff of Island County. Dkt. # 59-1. By the end of 2005, there were four candidates for the Republican nomination, including Deputy Jay Wallace.³ Dkt. # 59 at ¶ 30; Dkt. # 116 at ¶ 31. Sheriff Hawley declined to endorse any candidate in the hopes of keeping the Sheriff's office focused on its public safety mission during the election cycle. Dkt. # 59-1. In private conversation, however, Sheriff Hawley indicated that he would prefer "anybody but Jay Wallace" as the new Sheriff. Dkt. # 78 at ¶ 20.

Sometime after 11:23 p.m. on February 7, 2006, Deputy Wallace responded to a 911 call.⁴ Dkt. # 72 at ¶ 19; # 73-1 at 10; Dkt. # 114 at ¶ 19. Deputy Wallace reported to dispatch that he observed an individual putting on a pair of pants, running to the back of the residence, and refusing to answer. Dkt. # 73-1 at 11. Deputy Wallace spoke with a neighbor who confirmed that a man fitting the subject's description was supposed to be in the house.

² The Court recognizes that defendant Hawley is no longer the Sheriff of Island County. However, for simplicity, the Court will refer to him as Sheriff Hawley since he was the Sheriff at the time of the relevant events.

³ The Court recognizes that plaintiff Wallace is no longer a Deputy in Island County. However, for simplicity, the Court will refer to him as Deputy Wallace since that was his title at the time of the relevant events.

⁴ The parties spend a significant amount of time explaining the differences between “warm line” and “hang-up” 911 calls and the policies for responding to each type of call. The distinction between these types of calls, although helpful to the Court’s understanding of the facts, is not relevant to the legal analysis because the Court has not been asked to determine whether Deputy Wallace violated any policies. Accordingly, the Court will refer to the calls as simply 911 calls.

1 Dkt. # 73-1 at 12. Deputy Wallace concluded that the subject was not in need of any
2 assistance, but noted that “he’s refusing to answer the door or even make himself known at this
3 point.” Dkt. # 73-1 at 12. Just before 2:00 a.m. on February 8, 2006, another 911 call came in
4 from the same address. Deputy Wallace responded to dispatch, “[T]here was no problem there.
5 The party just would not open the door. . . . He seemed in good health.” Dkt. # 73-1 at 12. He
6 also told dispatch that the “guy ran into the living room, threw on a pair of pants, ran back to
7 the bedroom . . . and wouldn’t answer the door. . . . There was no problems there, cause [sic] he
8 was the only one there” Dkt. # 73-1 at 13. Deputy Wallace did not respond to the second
9 911 call.

10 At approximately 11:00 a.m. on February 8, 2006, Victoria Walker made a 911
11 call and stated that she had been assaulted the previous night. Ms. Walker stated that she had
12 called 911, but that her assailant, Matthew Friar, would not let her open the door when the
13 police responded. Dkt. # 59-2 at 32-34. In a statement taken by Detective Susan Quandt at the
14 hospital to which she was transported, Ms. Walker stated that Mr. Friar had placed her in the
15 closet and threatened to kill her and her son if she made her presence known to the deputy.
16 Dkt. # 59-4 at 5. Ms. Walker also described the physical assault in detail. Dkt. # 59-4 at 4.⁵

17 On February 9, 2006, Sheriff Hawley opened an internal investigation to
18 determine whether Deputy Wallace violated Sheriff’s office policies when he failed to make
19 contact with the 911 caller and subsequently failed to respond to a second call. Dkt. # 59 at
20 ¶ 14; Dkt. # 116 at ¶ 14. Deputy Wallace was notified of the investigation and that a woman
21 had reported that she was held against her will and assaulted in the house to which he had twice
22 been dispatched. Dkt. # 59 at ¶ 20; Dkt. # 59-2 at 24; Dkt. # 116 at ¶ 20. He was also informed
23 that this was a serious matter requiring independent investigation, that Sheriff Hawley believe

24 ⁵ A criminal investigation was conducted into Ms. Walker’s allegations, and the prosecutor
25 filed an information charging Mr. Friar with Unlawful Imprisonment, Harassment - Threats to Kill,
26 and Assault in the Fourth Degree - Domestic Violence. Dkt. # 73 at 7-8. The charges against Mr.
Friar were dismissed without prejudice later than month because investigators and the prosecuting
attorney “were unable to ever regain contact with” Ms. Walker. Dkt. # 73 at 2.

1 his actions may have jeopardized the victim's safety, and that he should refrain from discussing
2 the matter with anyone other than his family, his lawyer, and his union representatives. Dkt.
3 # 59 at ¶ 20; Dkt. # 59-2 at 24; Dkt. # 116 at ¶ 20. Sheriff Hawley appointed a recently-retired
4 Chief Deputy, J.D. Burns, to conduct an internal investigation. Dkt. # 59 at ¶ 14; Dkt. # 116 at
5 ¶ 14.

6 Within days, news that an unnamed Island County Deputy had been placed on
7 leave pending the outcome of an investigation regarding 911 policy violations was reported in
8 the newspapers. Dkt. # 74. Quotations attributed to Sheriff Hawley indicated that he believed
9 the alleged policy violations were serious and that, "[i]f these allegations regarding the
10 behavior of my deputy are true, it's very disturbing that we perhaps had an opportunity to end
11 this victim's night of terror." Dkt. # 74 at 1. Utilizing a public records search, the press
12 quickly identified Deputy Wallace as the deputy under investigation. Dkt. # 74 at 5. Pursuant
13 to Sheriff Hawley's directions, however, Deputy Wallace was not permitted to talk to the media
14 regarding the allegations against him.

15 As part of the investigation into the alleged policy violations, Deputy Wallace
16 was directed to provide a report, which he submitted on February 14, 2006 (but dated February
17 8, 2006). Dkt. # 72 at ¶18; # 73-1 at 4-7; Dkt. # 114 at ¶ 18. In his report, Deputy Wallace
18 stated that he had observed a naked female with shoulder length dark hair running towards the
19 front door where he stood. Dkt. # 73-1 at 4-7. According to Deputy Wallace, "[t]he naked
20 female grabbed her jeans in an effort to put them on, as she hopped around naked on one foot.
21 All during this time, she stood next to the front door, and could have opened the door at
22 anytime." Dkt. # 73-1 at 4-7.

23 Investigator Burns brought the discrepancies between the 911 transcripts (in
24 which Deputy Wallace reported seeing only a male in the house) and the Deputy's subsequent
25 report to Sheriff Hawley's attention. Sheriff Hawley decided to expand the scope of the
26 internal investigation and asked the Police Chief of the City of Oak Harbor to conduct a
criminal investigation to determine whether Deputy Wallace had filed a false report. Dkt. # 59
at ¶¶ 17-18; Dkt. # 116 at ¶¶ 17-18. Deputy Wallace was notified of the second investigation.

1 Dkt. # 74-2 at 40. Sergeant Jerry Baker, who was assigned to conduct the investigation,
2 interviewed Mr. Friar and the neighbor, both of whom made statements consistent with Deputy
3 Wallace's communications on the night of February 7, 2006, and inconsistent with the report he
4 submitted on February 14, 2006. Dkt. # 59 at ¶ 18; Dkt. # 59-4 at 17-21; Dkt. # 116 at ¶ 18.⁶
5 On March 16, 2006, Deputy Wallace provided written answers to questions posed by
6 Investigator Burns in which he reiterated that he had seen a female in the residence. Dkt. # 59-
7 5 at 43-46.⁷

8 Investigator Burns issued an Internal Investigation Report describing his
9 investigation regarding the events of February 7-8, 2006, and summarizing his findings. Dkt.
10 # 74-2 at 24-53. As part of the investigation, Investigator Burns interviewed Sergeant Rick
11 Norrie, Deputy Wallace's direct supervisor, visited the residence, interviewed neighbors,
12 reviewed the 911 transcript,⁸ contacted the detective who was investigating the alleged assault
13 on Ms. Walker, attended Ms. Walker's second interview, and reviewed statements made by Mr.
14 Friar. Dkt. # 74-2 at 33-42. He ultimately concluded that Deputy Wallace had mishandled
15 both the initial 911 call (by failing to make contact with the caller) and the second 911 call (by

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17 ⁶ In August 2006, Deputy Wallace was formally charged with False Swearing in violation of
18 RCW 9A.72.040(1). Dkt. # 69-4 at 13-14. The court ultimately determined that the report submitted
19 on February 14, 2006, was "compelled" and could not be used against Deputy Wallace in a subsequent
20 criminal proceeding. Dkt. # 69-4 at 18-20. The criminal charge against Deputy Wallace was
21 dismissed for lack of evidence on February 13, 2007. Dkt. # 69-4 at 25-26.

22 ⁷ An interview scheduled with Deputy Wallace had to be canceled because of a death in his
23 family. Rather than force Deputy Wallace to "endure an additional delay" (the interview had been
24 difficult to schedule and was cancelled once "due to attorney intervention"), Investigator Burns opted
25 to propound written questions. Dkt. # 74-2 at 32 and 40.

26 ⁸ The transcript of the first call coming from the residence starts with a male voice saying "I'll
27 fuck you up (inaudible)." Dkt. # 73-1 at 10. New recording technology had been installed which
28 instantly picked up and digitally record communications on a 911 call even before the call rings in the
29 dispatch center. The dispatchers had not yet been trained on the new equipment, however, so neither
30 they nor Deputy Wallace were aware of the threatening statement on February 7-8, 2006. Dkt. # 74-2
31 at 36.

1 failing to respond) and that Deputy Wallace had provided false information regarding the
2 events of that night.

3 Upon conclusion of the internal investigation, Sheriff Hawley scheduled a
4 meeting with two of his chief deputies, two deputy sheriff union representatives, Deputy
5 Wallace, a union attorney, and Deputy Wallace's private attorney. Dkt. # 59 at ¶ 21; Dkt. # 72
6 at ¶ 65; Dkt. # 114 at ¶ 66; Dkt. # 116 at ¶ 21. Although Deputy Wallace and his
7 representatives were given an opportunity to comment and provide new information, mitigating
8 circumstances, or rebuttal evidence regarding Investigator Burns' report, Deputy Wallace
9 declined to participate, apparently because he did not trust Sheriff Hawley "and believed that
10 anything that [he] said would be twisted and used against [him] like he had done with [the]
11 report and like he had reported in the media." Dkt. # 59 at ¶ 21; Dkt. # 72 at ¶ 65; Dkt. # 114 at
12 ¶ 66; Dkt. # 116 at ¶ 21. On April 10, 2006, five days after the meeting, Sheriff Hawley issued
13 his "Sheriff's Findings." Dkt. # 59-7 at 1-14. After reminding Deputy Wallace that, as a
14 trained law enforcement officer, the public expected him to "be honest, expeditious and
15 thorough in the performance of his . . . duties," Sheriff Hawley concluded that Deputy Wallace
16 had shirked his duties twice during the night of February 7, 2006, and that the material
17 inconsistencies in his statements to dispatch and subsequent written statements compelled a
18 finding that Deputy Wallace was "dishonest regardless which version more closely mirrors
19 reality." Dkt. # 59-7 at 12. Sheriff Hawley further stated:

18 But, the weight of the evidence is clear and compelling as to which version is the
19 truthful one. On the evening in question, you had no reason to be dishonest.
20 Further, your comments captured by ICOM's recording system are in sync with
21 other evidence and witness statements. There is no doubt in my mind that your
22 radio traffic and telephone conversations with ICOM at the time of the incident/s
23 reflect events as they really occurred. That being the case, your subsequent
24 sworn report and written response during the internal investigation contain
25 numerous, self-serving falsehoods and blatant lies. This is disgraceful and
26 unlawful.

24 Dkt. # 59-7 at 12-13. Deputy Wallace was discharged for good cause based on "the seriousness
25 of [his] policy violations, and solely because of [his] dishonesty and untruthfulness." Dkt.

1 # 59-7 at 13. When a reporter from KIRO TV contacted Sheriff Hawley to inquire why a
2 candidate for Sheriff had been fired, Sheriff Hawley did not pull his punches: “[Deputy
3 Wallace’s] behavior has been disgraceful, he should not be elected dog catcher.” Dkt. # 59 at
4 ¶ 25; Dkt. # 72-1; Dkt. # 116 at ¶ 25.

5 On April 11, 2006, the union grieved Deputy Wallace’s termination under the
6 collective bargaining agreement. Dkt. # 70-2 at 21-22. The union requested “copies of all
7 documents, records, archive’s notes, investigative materials, including the names and
8 statements of all witnesses interviewed, including those of the alleged victim and suspect in the
9 original call, and any other material relied on by the Department in reaching this decision.”
10 Dkt. # 70-2 at 21.⁹ Deputy Wallace produced two witnesses who testified that he had
11 mentioned seeing a woman at the residence prior to learning that he was under investigation.
12 Dkt. # 59-11 at 10-11; Dkt. # 76 at 17-18. On April 8, 2008, the arbitrator found that the
13 witnesses’ belated testimony was insufficient “to contradict the overwhelming evidence
14 developed by Investigator Burns as to the events of February 7 and 8, 2008.” Dkt. # 59-11 at
15 22. The arbitrator concluded that since Deputy Wallace’s “proven misconduct of filing a false
16 police report goes directly to the essence of the employer/employee relationship, . . . the
17 Employer had just cause to impose a penalty of discharge without utilizing progressive
18 discipline.” Dkt. # 59-11 at 22.

19 In September 2008, the Washington State Criminal Justice Training Commission
20 (“CJTC”) issued a statement of charges to revoke Deputy Wallace’s peace officer certification
21 based on his termination for conduct that would constitute a crime involving dishonesty or false
22 statement. Dkt. # 59-13 at 2. An administrative hearing was held in February 2009. Dkt. # 59-
23 13 at 1. On May 7, 2009, the CJTC issued its findings of fact and conclusions of law, revoking

24 ⁹ In his declarations, Deputy Wallace materially alters this quotation (by deleting the phrase
25 “including the names and statements of all witnesses interviewed”) and uses the altered quotation to
26 support his argument that the union requested all investigative materials related to Mr. Friar’s criminal
charges. Dkt. # 72 at ¶ 68; Dkt. # 114-1 at ¶ 69.

1 Deputy Wallace's certification. Dkt. # 59-13 at 1-18. Deputy Wallace did not appeal the
2 arbitration ruling or the CJTC order. Instead, he filed this action on May 11, 2009.

3 **DISCUSSION**

4 **I. Evidentiary Considerations**

5 In resolving a motion for summary judgment, the Court may only consider
6 admissible evidence. Orr v. Bank of America, 285 F.3d 764, 773 (9th Cir. 2002). Defendants
7 object to various materials submitted by plaintiffs on the grounds of speculation, hearsay,
8 improper opinion, irrelevance, lack of foundation, and lack of personal knowledge. Dkt. # 84
9 at 1-6. At the oral argument held on September 9, 2011, the Court identified certain
10 deficiencies with the evidence provided by both parties and ordered them to revise their
11 declarations so that they conform with the Federal Rules of Evidence. Dkt. # 109. This
12 exercise was only marginally successful. The Court has reviewed all the evidence, including
the revised declarations, and finds as follows:

13 **A. Declarations of Michael Hawley (Dkt. # 116) and John Sawyers (Dkt. # 115-1)**

14 Both Sheriff Hawley and Deputy Sawyers make statements that are inadmissible
15 on the basis of speculation, lack of personal knowledge, improper opinion testimony, hearsay,
16 and/or improper legal conclusion. For example, Sheriff Hawley's recitation of what Deputy
17 Wallace said at his deposition (Dkt. # 116 at ¶ 8) is pure hearsay and probably outside of his
18 personal knowledge. Deputy Sawyers, for his part, makes broad accusations (such as "[i]t
19 became obvious that Deputy Wallace was the target of Lieutenant Hawley because of Deputy
20 Wallace's candidacy for Island County Sheriff") with virtually no admissible supporting facts.
21 Dkt. # 115-1 at ¶ 9.¹⁰ The Court has considered only those statements that appear to be within
the personal knowledge of the witness and are otherwise admissible.

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23
24 ¹⁰ Even if Deputy Sawyers had personal knowledge regarding the oil change reprimand Deputy
25 Wallace reportedly received, there is no indication that Sheriff Hawley knew of, much less was
26 involved in, the reprimand.

1 **B. Declarations of Dale Kamerrer (Dkt. # 118), Gregory McBroom (Dkt. # 113-1),**
2 **and Carl Swanes (Dkt. # 79)**

3 Counsel may attach to their declarations documents produced in this litigation or
4 deposition testimony taken in this litigation, but may not provide substantive testimony or
5 argument as to the content of such documents or testimony. Fed. R. Evid. 602. The original
6 declarations prepared by Mr. Kamerrer and Mr. McBroom are hereby STRICKEN. The
7 revised declarations provided after oral argument are acceptable and have been considered.

8 Exhibits A and B to Dkt. # 79 are Mr. Swane's summaries of the depositions of
9 Sergeant Rick Norrie and Deputy Scott Davis. Mr. Swane's truncated interpretation of a
10 witnesses testimony is irrelevant and inadmissible. Exhibits A and B to Dkt. # 79 are hereby
11 STRICKEN. The Court has considered the actual deposition testimony of these witnesses to
the extent it was provided in the record.

12 **C. Declarations of Owen Burt (Dkt. # 77 and # 78)**

13 Plaintiffs have retained Mr. Burt as a law enforcement expert. Expert testimony
14 is permitted if "specialized knowledge will assist the trier of fact to understand the evidence or
15 to determine a fact in issue." Fed. R. Evid. 702. An expert witness may testify in the form of
16 an opinion if "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the
17 product of reliable principles and methods, and (3) the witness has applied the principles and
18 methods reliably to the facts of the case." *Id.* An expert witness cannot give an opinion as to
19 his legal conclusion, "i.e., an opinion on an ultimate issue of law," because instructing the jury
20 on the law is the exclusive province of the Court. Hangarter v. Provident Life & Acc. Ins. Co.,
373 F.3d 998, 1016 (9th Cir. 2004).

21 Testimony regarding written policies and procedures of which the witness has
22 personal knowledge falls within the realm of lay testimony. To the extent Mr. Burt has
23 provided testimony regarding matters within his personal knowledge, including written policies
24 and procedures, he may testify as a lay witness. The Court also finds that Mr. Burt's
25 specialized knowledge of unwritten policies, practices, procedures, or professional standards of
26 law enforcement, including appropriate responses to 911 calls, hang ups, and warm lines, may

1 assist a trier of fact to understand the evidence. The remainder of Mr. Burt's report and
2 declarations is not based on personal knowledge and is not properly characterized as expert
3 testimony insofar as it is not specialized knowledge that would assist a trier of fact to
4 understand the evidence or to determine a fact in issue.

5 Accordingly, the Court strikes the portions of Mr. Burt's report and declarations
6 that do not involve (1) lay testimony as to his personal knowledge or (2) expert testimony
7 regarding policies, practices, procedures or professional standards of Island County law
8 enforcement.

8 **D. Declaration of Jay Wallace (Dkt. # 114-1)**

9 Even after his declaration was revised, Deputy Wallace does not limit himself to
10 statements of fact of which he has personal knowledge. The majority of his declaration
11 consists of argument, analysis and interpretation of other evidence (much of which is not in the
12 record and/or not cited), supposition, improper opinion testimony, and/or hearsay. For
13 example, Deputy Wallace states that "Lt. Hawley was opposing my candidacy [for Sheriff] at
14 all times relevant to this matter" (Dkt. # 114-1 at ¶ 2) but fails to identify any statement or
15 conduct prior to the events of February 7-8, 2006, that suggests opposition or even a personal
16 dislike. His interpretations of the evidence are not only improper, they are sometimes so one-
17 sided that they verge on the illogical. See Dkt. # 114-1 at ¶ 61 (construing Mr. Friar's
18 statement that he was fully clothed and in the living room when Deputy Wallace shined his
19 light into the house as proof that Deputy Wallace saw a naked woman in the room). Plaintiffs
20 have, in effect, attempted to turn their 40-page response (which the Court hesitatingly
21 approved) into a 60+ page argument through the improper use of Deputy Wallace's declaration.

21 In accordance with the Federal Rules of Evidence, the Court has considered
22 statements of fact that appear to be within Mr. Wallace's personal knowledge and that are
23 otherwise admissible. The Court has also considered the exhibits attached to Mr. Wallace's
24 declaration. The Court has disregarded all other statements, including argument, legal
25 conclusions, hearsay, and improper opinion testimony.
26

1 **E. Speculation and Hearsay in General**

2 The Court has not considered deposition testimony or other sworn statements that
3 are not based on the witnesses' personal knowledge. For example, much of Sergeant Norrie's
4 testimony is based on speculation and/or hearsay and has not been considered. See, e.g., Dkt.
5 # 68-1 at 21 ("[T]hey were very concerned about Deputy Jay Wallace running for sheriff
6 because there was – I can't say specifically did I hear, but there was innuendoes to the extent
7 that he was taking votes away from another candidate that was running that could possibly lose
8 an opportunity for somebody else to get elected that they somewhat supported."); Dkt. # 68-1 at
9 34 ("I've heard that communication records had some seemingly placed or skewed or changed,
I don't know.").

10 **II. Plaintiffs' Motion to Vacate Arbitration Ruling**

11 Plaintiffs argue that the Court should vacate the April 2008 arbitration award
12 because the finding that there was just cause to terminate Deputy Wallace's employment was
13 obtained through "corruption, fraud, or other undue means." Dkt. # 83 at 8. In order to
14 invalidate an arbitration award because of fraud, the party seeking vacation must show that the
15 fraud was (1) not discoverable upon the exercise of reasonable diligence prior to the arbitration,
16 (2) materially related to an issue in the arbitration, and (3) established by clear and convincing
17 evidence. A.G. Edwards & Sons, Inc. v. McCollough, 967 F.2d 1401, 1404 (9th Cir. 1992); see
18 also Seattle Packaging Corp. v. Barnard, 94 Wn. App. 481, 487 (1999) (holding that under
19 Washington state law, an arbitration award may be vacated based on "corruption, fraud or other
20 undue means" if the moving party establishes the existence of fraud by clear and convincing
21 evidence, the fraud was not discoverable upon the exercise of due diligence before the close of
22 the arbitration hearing, and the fraud materially related to an issue of consequence in the
arbitration).

23 Plaintiffs' claim of fraud is based on defendants' alleged concealment of evidence
24 and the submission of "false evidence, opinion and claims to the arbitrator." Dkt. # 83 at 9.
25 Plaintiffs claim that defendants failed to produce the investigative file regarding Ms. Walker's
26 allegations of sexual and physical assault against Matthew Friar until after the arbitration

1 proceeding was completed (and just before the decertification hearing). In particular, plaintiffs
2 identify the report of Detective Susan Quandt as evidence that should have been provided. The
3 Quandt report includes, among other things, interviews with Ms. Walker, conversations with
4 Ms. Walker's doctors, summaries of Detective Quandt's day-to-day activities as the
5 investigating officer, and information regarding Ms. Walker's criminal history, prior false
6 statements, and mental health issues. Dkt. # 73 at 14-39.

7 Plaintiffs argue that the Quandt report and other investigative materials related to
8 the allegations against Mr. Friar were responsive to an April 11, 2006, request for documents
9 propounded by the union attorney Patrick Emmal. Dkt. # 59-8 at 9. They were not. Mr.
10 Emmal requested "copies of all documents, records, archive's notes, investigative materials,
11 including the names and statements of all witnesses interviewed, including those of the alleged
12 victim and suspect in the original call, and any other material relied on by the Department in
13 reaching this decision." Dkt. # 70-2 at 21. "[T]his decision" meant the decision to terminate
14 Deputy Wallace's employment. The investigative materials Mr. Emmal requested related to the
15 investigation of Deputy Wallace's conduct, not Mr. Friar's. While Mr. Emmal's request
16 encompassed statements taken from Ms. Walker and Mr. Friar, it was limited to those
17 statements that were relied upon by Sheriff Hawley when he fired Deputy Wallace. Detective
18 Quandt did not complete her report until after Deputy Wallace was fired, and plaintiffs have
19 made no effort to show that it (or a draft) was considered when making the termination
20 decision.

21 Even if one were to assume that Sheriff Hawley relied upon pre-termination
22 statements of Ms. Walker and Mr. Friar when determining whether Deputy Wallace violated
23 policies and/or filed false reports, and that transcripts of these statements were not provided in
24 response to Mr. Emmal's request, the omission would not justify overturning the arbitration
25 decision. A discovery dispute over what should have been produced prior to arbitration does
26 not necessarily establish fraud or intentional concealment. The fact that Ms. Walker and Mr.
Friar were interviewed during the course of the criminal investigation was not hidden from

1 Deputy Wallace. He could have, with the exercise of reasonable diligence prior to the
2 arbitration, obtained copies of any statements they had made.

3 In addition, the criminal investigation file and its contents are only tangentially
4 related to the issues presented to the arbitrator. Deputy Wallace was accused of shirking his
5 duty and falsifying a report in an attempt to avoid blame. The question before the arbitrator
6 was “did Island County have just cause to terminate Deputy Wallace’s employment?” A
7 thorough review of all of the evidence submitted by plaintiffs, including the materials they say
8 were withheld during the arbitration, fails to reveal anything that could be considered
9 “exonerating” evidence. The stories Ms. Walker and Mr. Friar told during the investigation
10 were materially inconsistent with Deputy Wallace’s February 14th report and support the
11 arbitrator’s finding that Deputy Wallace lied. Although plaintiffs suggest that evidence
12 regarding Ms. Walker’s mental health and criminal record would have established that she was
13 not assaulted, such a conclusion would neither be compelled nor supported. The fact that Ms.
14 Walker may have had a difficult or unsavory life tells us very little about the events of February
15 7-8. Evidence other than Ms. Walker’s statements support her story, and an independent
16 prosecutor, with full knowledge of the criminal investigation and Ms. Walker’s history, chose
17 to file charges against Mr. Friar based on the totality of the evidence.

18 Even if it turns out that Ms. Walker fabricated or exaggerated her allegations
19 against Mr. Friar (a finding that has never been made and is not supported by the record before
20 the Court), the arbitrator was tasked with determining whether Deputy Wallace appropriately
21 responded to the 911 calls and/or lied about the events of February 7th. The answers to those
22 questions are not impacted by the contents of the investigative file related to Mr. Friar. The
23 way Deputy Wallace handled the two 911 calls and the material discrepancies in his February
24 14th report do not depend on whether or not Ms. Walker was held against her will and
25 assaulted. Plaintiffs’ allegations of concealment do not justify the vacation of the arbitrator’s
26 decision.

Plaintiffs also allege that defendants intentionally misled the arbitrator by
repeatedly stating that Ms. Walker had been beaten and raped as a result of Deputy Wallace’s

1 failure to respond to the 911 calls in an appropriate manner. Plaintiffs maintain that this
2 allegation was false and that it materially influenced the arbitrator's decision. In their post-
3 hearing brief, defendants state four times that Ms. Walker was beaten and raped. Dkt. # 72-2 at
4 5, 21, 29, 33. There was, however, no judicial finding that Ms. Walker was physically and
5 sexually assaulted on the night of February 7th: rather, these statements were based on Ms.
6 Walker's allegations. While repeating a victim's statements without proper attribution may
7 have been overzealous and/or careless, it does not rise to the level of fraud in this case. There
8 was ample evidence in the record to support defendant's statements, even if they were not
9 judicially-proven facts.¹¹ Mere "sloppy or overzealous lawyering" does not constitute fraud or
10 undue means. A.G. Edwards & Sons, Inc. v. McCollough, 967 F.2d 1401, 1403 (9th Cir.
11 1992).¹²

12 More importantly, there is no indication that the arbitrator was fooled into
13 thinking that the assault and rape accusations had been proven beyond a reasonable doubt.
14 Throughout the post-hearing brief, defendants attribute the allegations of rape and beating to
15 Ms. Walker and/or acknowledge that the accusations had not been established. Dkt. # 72-2 at
16 6, 19, 22, 25. The arbitrator, for his part, refers to the rape and beating as part of the
17 employer's argument or properly attributes those allegations to Ms. Walker. Dkt. # 59-11 at
18 10, 12, 16, 17. The arbitrator never states as a matter of fact that Ms. Walker had been beaten
19 and raped. Finally, the arbitrator based his decision that there was just cause for termination on
20 his findings that Deputy Wallace violated policy and was dishonest: the decision was not based
21 on the alleged assault. Dkt. # 59-11 at 15, 17-22.

22 Having waded through the voluminous record in this matter, heard the arguments
23 of counsel, and attempted to follow the logic of plaintiffs' arguments, the Court feels compelled
24

25 ¹¹ See Dkt. # 59-2 at 28 (911 recording of profane threat); Dkt. # 59-2 at 32-35 (911 recording
26 in which Ms. Walker stated she was assaulted); Dkt. # 73 at 18, 19, 24, 25, 27 (Quandt Report
summarizing Ms. Walker's statements regarding physical and sexual assault and physical evidence of
injuries).

¹² The cases cited by plaintiff on this issue are factually distinguishable and unpersuasive.

1 to note that, in plaintiffs' strenuous efforts to discredit Ms. Walker and her accusations by any
2 means, they make unsupported arguments and draw irrational inferences that would, if not
3 carefully analyzed, mislead the Court regarding the state of the record. For example, plaintiffs
4 baldly state that "[t]here was no evidence that Victoria Walker was a victim of any crime."
5 Dkt. # 83 at 5. The statement is simply false. Plaintiffs ignore Ms. Walker's allegations, the
6 various pieces of evidence that support those allegations, and the prosecutor's decision to file
7 an information charging Mr. Friar with Unlawful Imprisonment, Harassment - Threats to Kill,
8 and Assault in the Fourth Degree - Domestic Violence. Dkt. # 73 at 7-8. The fact that Mr.
9 Friar was not found guilty does not mean that a crime did not occur, or that Ms. Walker's
10 allegations were false. It simply means, unremarkably, that Mr. Friar could not be prosecuted
11 after the complaining witness disappeared. Ms. Walker's relationship with Mr. Friar and her
12 criminal and drug histories may bear on her credibility, but these factors fall well short of
13 proving that her allegations were false. Plaintiffs' misstatements and overstatements in this
proceeding are far more troubling and material than those of which defendants are accused.

14 For all of the foregoing reasons, plaintiffs have failed to demonstrate that
15 defendants concealed relevant information or put forth false evidence to the arbitrator that
16 would justify vacating the arbitration award for corruption, fraud, or other undue means. The
Court therefore DENIES plaintiffs' motion for partial summary judgment.

17 **III. Defendants' Motion for Summary Judgment**

18 **A. Negligence Claim**

19 Plaintiffs allege that defendants had a duty to provide full and accurate
20 information to Deputy Wallace and the arbitrator and that they breached this duty by failing to
21 provide the Friar investigative file in a timely manner and by asserting that Ms. Walker had
22 been beaten and raped. Dkt. # 49 at 9. The source of the alleged duty is unclear. Plaintiffs
23 have not identified, and the Court is unaware of, a free-floating obligation to provide full
24 disclosure from one person to another or to ensure that all communications are factually
25 accurate. Such a duty may, of course, arise in certain circumstances. For example, parties who
26 share a special or fiduciary relationship, parties who are under a legal duty to provide

1 disclosures or speak the truth, or parties to a contract may be subject to specific disclosure and
2 accuracy obligations. Although plaintiffs argue that certain duties arose from the collective
3 bargaining agreement, they have asserted a contract-based claim to address the alleged breach.
4 Absent some indication that a common law duty of disclosure or truthfulness applied in this
5 case, plaintiffs' negligence claim must fail.

6 Defendants' motion for summary judgment regarding plaintiffs' negligence claim
7 is GRANTED.

8 **B. Breach of Implied Covenant of Good Faith and Fair Dealing**

9 Plaintiffs allege that Island County breached the covenant of good faith and fair
10 dealing when it failed to provide evidence that was material to the grievance procedure in a
11 timely manner (*i.e.*, the criminal investigation files related to Mr. Friar).¹³ Dkt. # 49 at 9-10.
12 Plaintiffs argue that defendants' failure to produce the criminal investigation documents related
13 to Mr. Friar breached the collective bargaining agreement and a longstanding Sheriff's office
14 policy to produce all exculpatory information related to an internal investigation. Dkt. # 80 at
29-30.¹⁴

15 ¹³ In their complaint, plaintiffs also assert that defendants breached the covenant by making
16 false statements to the arbitrator – presumably the statement that Ms. Walker was beaten and raped.
17 Dkt. # 49 at 9-10. Plaintiffs do not support this claim in their response to defendants' motion for
summary judgment.

18 ¹⁴ The Court ordered the parties to provide additional briefing regarding whether section 301 of
19 the Labor Management Relations Act ("LMRA") preempts plaintiffs' negligence and breach of
20 implied covenant claims. Pursuant to Section 2(2) of the Wagner Act, 29 U.S.C. § 152(2), "[t]he term
21 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not
22 include . . . any State or political subdivision thereof . . ." Defendants do not dispute that Island
23 County is a "political subdivision" of the State of Washington, as that term has been interpreted by the
24 National Labor Relations Board and the Supreme Court. NLRB v. Natural Gas Util. Dist., 402 U.S.
25 600, 604-05 (1970). Congress "enacted the § 2(2) exemption to except from Board cognizance the
26 labor relations of federal, state, and municipal governments, since governmental employees did not
usually enjoy the right to strike." Natural Gas Util. Dist., 402 U.S. at 604. At the time it enacted the
Wagner Act, Congress was not willing to intrude upon the employment relationship between the State
and its employees: considerations of state sovereignty and the Eleventh Amendment's grant of
immunity from suit in federal courts militated in favor of the exclusion. Crestline Mem'l Hosp.
Assoc., Inc. v. NLRB, 668 F.2d 243, 245 n.1 (6th Cir. 1982). In passing the Taft-Hartley Act,

1 Plaintiffs' breach of contract claim, to the extent it was properly alleged, fails.
2 Plaintiffs have not identified any provision of the collective bargaining agreement that was
3 breached. Nor did plaintiffs exhaust the grievance mechanism provided in the collective
4 bargaining agreement regarding the employer's alleged failure to provide information. See
5 DelCostello v. Int'l Blvd. of Teamsters, 462 U.S. 151, 163 (1983). Deputy Wallace's failure to
6 exhaust the collective bargaining agreement grievance procedures (or show that his union
7 violated its duty of fair representation) mandates dismissal of the breach of contract claim. See
8 DelCostello, 462 U.S. at 164; Soremekun v. Thrifty Payless, Inc., 509 F.3d 978, 987 (9th Cir.
2007).

9 Plaintiffs' argument regarding policy violations fails as a matter of fact. As the
10 Court has already noted, a thorough review of all of the evidence submitted by plaintiffs,
11 including the materials they say were withheld during the arbitration, fails to reveal anything
12 that could be considered "exculpatory." The criminal investigation generated statements and
13 evidence that support the arbitrator's finding that Deputy Wallace mishandled the 911 calls and
14 made materially false statements in his February 14th report. No reasonable juror, in full
15 possession of the record presented here, could reasonably conclude that because Ms. Walker
16 had mental health and credibility problems, she was not assaulted on the night of February 7th
and Deputy Wallace's version of events must be true.

17 Defendants' motion for summary judgment regarding plaintiffs' claim for breach
18 of implied covenant of good faith and fair dealing is GRANTED.

19 **C. Public Records Act ("PRA") Claim**

20 Plaintiffs allege that defendants' failure to produce the investigative file related to
21 the charges against Mr. Friar in response to Mr. Emmal's April 11, 2006, request violated the

22
23 Congress incorporated the definitions contained in the Wagner Act, including the public entity
24 exclusion. As compellingly reasoned by the Third Circuit, "the legislative silence during the passage
25 of the Taft-Hartley Act with reference to the carrying forward of the exemption for states and political
subdivisions, if it meant anything, meant approval of the exemption." Crilly v. Southeastern Pa.
Transp. Auth., 529 F.2d 1355, 1363 (3rd Cir. 1976).

1 PRA. Defendants argue that the PRA claim is barred by the statute of limitations. Dkt. # 58 at
2 15. Plaintiffs maintain that the statute of limitations did not begin to run until the last
3 production responsive to the record request was made, which plaintiffs assert was February
4 2009. Dkt. # 80 at 19. Because the Court finds that plaintiffs' request for information related
5 to his grievance did not constitute a public records request, the Court need not address the
6 statute of limitations issue.

7 Mr. Emmal testified that the obligation to provide collective bargaining-related
8 documents is broader than the obligation to produce documents under the PRA, such that all
9 requested information, whether privileged or not under the PRA, should have been produced in
10 response to his request. Dkt. # 68-1 at 6-7, Ex. A at 21:23-22:25. Mr. Emmal did not testify
11 that he had made, or intended to make, a public records request under the PRA. Rather, he was
12 seeking discovery related to a union member's grievance and expected the production to
13 proceed as contemplated under the collective bargaining agreement. Under plaintiffs' theory,
14 every request for documents under a collective bargaining agreement with a public entity would
15 constitute a public records requests, thereby converting simple discovery disputes into potential
16 statutory violations. There is nothing in the statute or the record presented here that would
17 justify such conflation.

18 Defendants' motion for summary judgment with respect to the PRA claim is
19 GRANTED.

20 **D. Section 1983: Due Process Claim**

21 Defendants argue that plaintiffs' due process claim should be dismissed because
22 of the preclusive effect of the arbitration and administrative decisions. Dkt. # 58 at 17.¹⁵ The
23 arbitration decision does not, however, preclude litigation of related statutory claims. The
24 arbitrator's authority over the grievance procedure derived solely from the collective bargaining
25 agreement. See Dkt. # 69 at 44-65 (Ex. F at Art. 5). The Supreme Court has held that

26 ¹⁵ Defendants seek dismissal of a "veiled" wrongful termination claim. Because the complaint
does not assert a wrongful termination claim, the Court will address only whether collateral estoppel
bars plaintiffs' § 1983 claim for constitutional violations.

1 arbitration of contract-based claims pursuant to a collective bargaining agreement does not
2 preclude subsequent judicial resolution of statutory claims. See McDonald v. City of W.
3 Branch, 466 U.S. 284, 292 (1984) (holding that “in a § 1983 action, a federal court should not
4 afford res judicata or collateral-estoppel to effect an award in an arbitration proceeding brought
5 pursuant to the terms of a collective-bargaining agreement.”); Barrentine v. Arkansas-Best
6 Freight Sys., Inc., 450 U.S. 728, 745 (1981) (holding that unsuccessful arbitration of union’s
7 collective bargaining agreement did not preclude federal lawsuit alleging violations of the Fair
8 Labor Standards Act); Alexander v. Gardner-Denver Co., 415 U.S. 36, 49, 59-60 (1974)
9 (holding that arbitration of whether employee was discharged for just cause was not preclusive
10 of Title VII claims because collective bargaining agreement did not cover statutory claims).
11 Since the employees in McDonald, Barrentine, and Gardner-Denver “had not agreed to arbitrate
12 their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the
13 arbitration in those cases understandably was held not to preclude subsequent statutory actions.”
14 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 129 S. Ct. 1456, 1468 (2009). In this case, Deputy
15 Wallace requested an employment arbitration pursuant to the collective bargaining agreement,
16 which does not expressly authorize the arbitrator to decide § 1983 claims. Dkt. # 69 at 49 (Ex.
17 F, Art. 5). Accordingly, the Court will not give preclusive effect to the arbitration decision.

18 With respect to the decision of the CJTC, the Court must determine whether the
19 state administrative tribunal was acting in a judicial capacity to resolve disputed issues of fact
20 that were properly before it and provided the parties with an adequate opportunity to litigate.
21 United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966); Miller v. County of
22 Santa Cruz, 39 F.3d 1030, 1032-33 (9th Cir. 1994) (federal common law rules of preclusion
23 “extend to state administrative adjudications of legal as well as factual issues, even if
24 unreviewed, so long as the state proceeding satisfies the requirements of fairness outlined in
25 [Utah Construction].” In determining whether a state administrative proceeding provided an
26 adequate and fair opportunity to litigate, the Court considers whether the proceeding was
conducted with sufficient safeguards to be equated with a state court judgment. Miller, 39 F.3d
at 1033; Plain v. McCabe, 797 F.2d 713, 719 (9th Cir. 1986). The Court has therefore reviewed

1 the administrative record to ensure that the proceeding meets Washington’s criteria for giving
2 preclusive effect to a state agency’s decisions.

3 Under Washington law, “[c]ollateral estoppel, or issue preclusion, bars relitigation
4 of an issue in a subsequent proceeding involving the same parties.” Christensen v. Grant Cnty.
5 Hosp. Dist. No. 1., 152 Wn.2d 299, 306 (2004). Collateral estoppel precludes the relitigation of
6 issues that were “necessarily and finally determined in the earlier proceeding,” even if a
7 different claim or cause of action is asserted in the later proceeding. Christensen, 152 Wn.2d at
8 306-07. To invoke collateral estoppel, defendants must establish that: (1) the issue decided in
9 the earlier proceeding was identical to the issue presented in the later proceeding; (2) the earlier
10 proceeding ended in a judgment on the merits; (3) the party against whom collateral estoppel is
11 asserted was a party to, or in privity with a party to, the earlier proceeding; and (4) application
12 of collateral estoppel does not work an injustice on the party against whom it is applied.
13 Christensen, 152 Wn.2d at 306-07. Decisions of administrative agencies may be given
14 preclusive effect in subsequent litigation, but Washington courts will consider the following
15 additional factors when determining whether an administrative decision precludes relitigation of
16 an issue: (1) whether the agency acted within its competence in making a factual decision,
17 (2) agency and court procedural differences, and (3) policy considerations. State v. Dupard, 93
18 Wn.2d 268, 275 (1980).

19 The CJTC hearing at issue here resembled a judicial proceeding. The parties
20 appearing in the hearing were the Washington State Criminal Justice Training Commission and
21 Deputy Wallace. Both sides were represented by counsel, both sides had an opportunity to
22 present testimonial and documentary evidence, and both sides submitted memoranda and
23 presented arguments. See Dkt. # 59-13 at 1. Deputy Wallace testified on his own behalf and
24 presented the testimony of Lana Wallace, Michael Gregory Anderson, Sergeant Norrie, Deputy
25 Franklin Gomez, and Deputy John Sawyers. Id. at 4 ¶ 2.3. The CJTC panel also considered
26 documentary exhibits offered by both parties. Id. at 4-5 ¶¶ 2.4-2.5. The CJTC panel made
specific findings of fact and conclusions of law regarding disputed issues.

1 Plaintiffs argue that they did not have a full and fair opportunity to litigate the
2 issues underlying his § 1983 claim in the state administrative proceeding because the CJTC
3 panel limited evidence to “avoid re-arbitrating” the validity of the termination. Plaintiffs assert
4 that the panel precluded Deputy Wallace from calling a particular witness and declined to
5 consider evidence that cast doubt on Ms. Walker’s credibility. Dkt. # 80 at 15. The only
6 citation provided is to Exhibit AA of the Declaration of Gregory A. McBroom (Dkt. # 70-3 at
7 2), but that exhibit relates to the arbitration proceeding, not the CJTC proceeding.¹⁶ A review of
8 the transcript of the CJTC proceeding shows that the main issue before the panel – whether the
9 CJTC should revoke Deputy Wallace’s peace officer’s certification under RCW
10 43.101.105(1)(d) – necessarily involved an assessment of Deputy Wallace’s conduct and the
11 propriety of his termination. The panel had to determine whether Deputy Wallace was
12 “discharged for disqualifying misconduct,” *i.e.*, whether he was “terminated from employment
13 for: (a) Conviction of . . . any crime involving dishonesty or false statement within the meaning
14 of Evidence Rule 609(a) . . . [or] (b) conduct that would constitute any of the crimes addressed
15 in (a) or this subsection.” RCW 43.101.010(8).¹⁷

15 During the hearing, Presiding Sheriff Mahoney stated, “The panel is here today in
16 the matter of former Island County Deputy Sheriff Jay Wallace, Cause no. 06-139, and to take
17 evidence and rule on the petitioner’s statement of charges as amended on December 8, 2008.”
18 Dkt. # 70-4 at 2. During the pre-hearing teleconference, Presiding Sheriff Mahoney ruled on

19 ¹⁶ Plaintiffs also state (without citation to the record) that the CJTC Statement of Charges
20 against Deputy Wallace dated September 8, 2008, includes an assertion that the victim had been beaten
21 and sexually assaulted. Dkt. # 80 at 15. The Court has not been able to locate in the voluminous
22 record the Statement of Charges or the Amended Statement of Charges that formed the basis of the
23 administrative hearing. Accordingly, the Court has disregarded this argument.

24 ¹⁷ The Court acknowledges that the criminal charges against Deputy Wallace for false swearing
25 were dismissed because the court suppressed Deputy Wallace’s officer’s statement of February 14,
26 2006, pursuant to Garrity v. New Jersey, 384 U.S. 493 (1967), and Seattle Police Officers’ Guild v.
City of Seattle, 80 Wn. 2d 307, 310 (1972). Dkt. # 59-9. The exclusion of his statements in a criminal
prosecution does not, however, require the exclusion of the same statements in non-criminal matters,
such as Deputy Wallace’s grievance and the decertification proceedings.

1 objections to proposed witnesses and exhibits based on their relevance to the amended
2 statement of charges. Dkt. # 59-13 at 3; # 71-1 at 8-23. Presiding Sheriff Mahoney excluded
3 the testimony of Deputy Davis and the Quandt report, among other evidence, because they were
4 irrelevant, inadmissible hearsay, or redundant. Dkt. # 71-1 at 12, 14. Counsel for Deputy
5 Wallace specifically requested the opportunity to review the criminal investigation file and
6 offer evidence from it if she found “something that [she thought was] strictly relevant to the
7 charges against Jay Wallace.” Dkt. # 71-1 at 14. Presiding Sheriff Mahoney responded, “I
8 would not have a problem with that as a process.” Dkt. # 71-1 at 14. Presiding Sheriff
9 Mahoney admitted the testimony of Michael Anderson, a witness from the criminal
10 investigation. Dkt. # 70-4 at 18-24. Mr. Anderson testified that he saw Ms. Walker the night of
11 the alleged assault hourly from 6:00 in the evening until 3:00 in the morning. Deputy John
12 Sawyers also testified that Deputy Wallace had told him that he had seen a woman on the
13 alleged night of the incident. Dkt. # 70-4 at 27-28. Plaintiffs were clearly permitted to present
evidence regarding the events of February 7-8, 2006.

14 On April 29, 2009, the CJTC panel made specific findings of fact and conclusions
15 of law. Regarding the false statements allegedly made by Deputy Wallace, the panel found:

16 3.29 Deputy Wallace knowingly made a false statement when he
17 stated that he “observed a naked female with shoulder length dark
18 hair, running towards me (towards the front of the residence). The
19 naked female grabbed her jeans in an effort to put them on, as she
hopped around naked on one foot. All during this time, she stood
next to the front door, and could have opened the door at any time.”

20 * * *

21 3.31 Deputy Wallace knowingly made a false statement when he
22 stated, regarding his talk with the neighbor: “I informed her that I
had observed a thin female with shoulder length dark hair at the
residence, fleeing to the rear of the house. . . .”

23 * * *

24 3.37 In his written responses of March 15, 2006 to Special
25 Investigator Burns, he knowingly made false statements that the
26 gender of the person he observed in the residence at 1480
Shoreview Drive on February 7, 2006 was female.

1 Dkt. # 59-13 at 10-12. The panel also found that Deputy Wallace's intentional misstatements
2 were material and were reasonably likely to be relied upon by Detective Quandt, Special
3 Investigator Burns, and/or Sheriff Hawley in the discharge of their official powers or duties.

4 Dkt. # 59-13 at 10-12. Based on the above findings of fact, the panel made the following
5 conclusions of law:

6 4.12 . . . [Deputy Wallace] engaged in conduct that would
7 constitute a crime involving dishonesty or false statement within the
8 meaning of Evidence Rule 609(a), specifically, the crime of making
9 a False or Misleading Statement to a Public Servant when he
10 knowingly made false, material statements to Detective Quandt,
11 Special Investigator Burns, and Sheriff Hawley through his written
12 statement when he stated that he "observed a naked female with
13 shoulder length dark hair, running towards me This conduct is
14 disqualifying misconduct under RCW 43.101.010(8)(b).
15

16 * * *

17 4.14 . . . [Deputy Wallace] engaged in conduct that would
18 constitute a crime involving dishonesty or false statement . . .
19 through his written statement when, regarding his talk with the
20 neighbor, he stated: "I informed her that I had observed a thin
21 female with shoulder length dark hair at the residence, fleeing to the
22 rear of the house." . . . This conduct is disqualifying misconduct
23 under RCW 43.101.010(8)(b).
24

25 * * *

26 4.16 . . . [Deputy Wallace] engaged in conduct that would
constitute a crime involving dishonesty or false statement . . .
through his written response to Special Investigator Burns'
questions" This conduct is disqualifying misconduct under
RCW 43.101.010(8)(b).

20 Dkt. # 59-13 at 15-17.

21 After a careful review of the administrative record provided to the Court, it is
22 apparent that the CJTC panel did not simply adopt or even rely heavily on the arbitrator's
23 findings. Rather, similar to a state court proceeding, the panel heard testimony, admitted (or
24 excluded) evidence, and made an independent assessment of the issues before the panel.
25 Deputy Wallace had an adequate opportunity to litigate the issue of whether his statements
26 about seeing a woman were false and whether his termination was justified before the CJTC.

1 The fact that the presiding officer made adverse evidentiary rulings on the basis of relevance,
2 hearsay, and/or duplicity does not mean that Deputy Wallace was deprived of a full and fair
3 opportunity to litigate these issues. The Court finds that there are no policy considerations
4 which militate against giving preclusive effect to the issues decided by the CJTC. To the extent
5 plaintiffs seek to relitigate the truth of Deputy Wallace's statements that he saw a woman in the
6 house or whether those statements justified his termination and the revocation of his peace
7 officer's certification, they are precluded from doing so.

8 Plaintiffs allege that defendants deprived Deputy Wallace of "liberty and property
9 interests, depriving him of both procedural due process and substantive due process rights
10 within the meaning of the due process clauses of the Fifth and Fourteenth Amendments to the
11 United States Constitution." Dkt. # 49 at 13. This claim appears to be based on the underlying
12 assumption that Deputy Wallace truthfully reported seeing a woman in the house on February
13 7th and that Sheriff Hawley maliciously and improperly brought about his termination.
14 Plaintiffs may not, however, collaterally challenge the conclusions of the CJTC panel or
15 otherwise relitigate the findings that Deputy Wallace made false material statements and was
16 properly terminated.

17 To the extent plaintiffs are claiming that they had a property or liberty interest in
18 pursuing (or obtaining) the elected Sheriff's position, the due process claim also fails. Plaintiffs
19 apparently acknowledge that Deputy Wallace had no property interest in the Sheriff's position,
20 but argue that he had "a *liberty interest* in pursuing the elected position." Dkt. # 80 at 36
21 (emphasis in original). Plaintiffs cite Briscoe v. Kusper, 435 F.2d 1046, 1053, 1058 (7th Cir.
22 1970), in support of this proposition. Briscoe did not find that a citizen has a separate liberty
23 interest in pursuing or obtaining an elected position, however. In fact, the court noted Supreme
24 Court decisions which clearly state that candidates for political office do not have a liberty
25 interest in being considered for an office or elected. See Snowden v. Hughes, 321 U.S. 1, 7
26 (1944) ("More than forty years ago this Court determined that an unlawful denial by state action
of a right to state political office is not a denial of a right of property or of liberty secured by the
due process clause. . . . we reaffirm it now.") (citing Taylor & Marshall v. Beckham, 178 U.S.

1 548, 577-78 (1900)). See also Douglas v. Niagara County Bd. of Elections, 2007 WL 3036809
2 at *4 (W.D.N.Y. 2007) (“plaintiff lacked a protected property or liberty interest in his
3 candidacy for Mayor of Niagara Falls.”).

4 The Seventh Circuit did, however, note that “the concept of ‘liberty’ protected
5 against state impairment by the Due Process Clause of the Fourteenth Amendment includes the
6 freedoms of speech and association and the right to petition for redress of grievances.” Briscoe,
7 435 F.2d at 1053. Plaintiffs have not shown that this importation of First Amendment rights
8 into the due process clause has been adopted by the Ninth Circuit. Even if Briscoe were the law
9 in this Circuit, Deputy Wallace, unlike the plaintiff in the Seventh Circuit case, was not
10 excluded from the ballot by the type of arbitrary and capricious state action upon which a due
11 process claim can be based. Deputy Wallace’s right to participate in electoral politics was
12 impaired only because his conduct in February 2006 made him unpalatable to the electorate. To
13 the extent plaintiffs are arguing that defendants made up the charges against him in order to ruin
14 his candidacy, the CJTC panel has preclusively determined that Deputy Wallace made false
15 statements justifying the revocation of his peace officer certification. That issue cannot be
16 relitigated here.

17 Defendants’ motion for summary judgment regarding plaintiffs’ due process
18 claim is GRANTED.

19 **E. Section 1983: First Amendment Claim**

20 Plaintiffs allege that defendants “wrongfully terminated [Deputy Wallace’s]
21 employment for exercising his constitutional free speech rights and right to run for election as
22 the next Island County Sheriff.” Dkt. # 49 at 11. In order to sustain a First Amendment
23 retaliation claim, a public employee must show that (1) the employee engaged in
24 constitutionally protected speech, (2) the employer took adverse employment action against the
25 employee, and (3) the employee’s speech was a substantial or motivating factor in the adverse
26 action. Posey v. Lake Pend Oreille Sch. Dist. No. 84, 546 F.3d 1121, 1126 (9th Cir. 2008).
Once the employee satisfies his burden, the employer must show by a preponderance of the
evidence that it would have reached the same decision or that it would have engaged in the

1 same conduct even in the absence of the protected expression. Thomas v. Douglas, 877 F.2d
2 1428, 1431 (9th Cir. 1989). The employee may refute this assertion by showing that the
3 employer's proffered explanation is merely pretextual. See Strahan v. Kirkland, 287 F.3d 821,
4 825 (9th Cir. 2002).

5 The Court will assume for purposes of this motion that participation in the
6 electoral process is protected activity under the First Amendment (see Bardzik v. County of
7 Orange, 635 F.3d 1138, 1144 (9th Cir. 2011) ("The First Amendment protects the rights of
8 citizens to criticize a government official, to support a candidate opposing an elected official, or
9 to run against an elected official.") and that Deputy Wallace suffered an adverse employment
10 action when he was terminated. Whether an employee's protected conduct was a substantial or
11 motivating factor in an employer's decision to take action against the employee is a question of
12 fact that normally should be left for trial. Ulrich v. City & County of San Francisco, 308 F.3d
13 968, 979 (9th Cir. 2002). Defendants argue, however, that there is a complete lack of evidence
14 from which a reasonable jury could conclude that plaintiffs' First Amendment activities were a
15 substantial or motivating factor in his termination. Dkt. # 58 at 20.

16 Plaintiffs' theory of the case is that Sheriff Hawley vigorously investigated the
17 events of February 7-8 and the veracity of Deputy Wallace's February 14th report because he
18 was looking for a way to derail his campaign for Sheriff. Dkt. # 80 at 34. The evidence of
19 improper motive consists of:

20 § the timing between Deputy Wallace's declaration of his candidacy for Island County
21 Sheriff (July 2005) and the investigation (February 2006);

22 § Sheriff Hawley's pre-investigation statement to former Island County Sheriff Burt
23 that he supported "anybody but Jay Wallace"¹⁸ as candidate for Sheriff (Dkt. # 78
24 at ¶ 20);

25 ¹⁸ The Court recognizes that Sheriff Hawley disputes that he made such a statement. Dkt. #85
26 (Second Hawley Decl.) ¶6. However, the Court must review the facts in the light most favorable to the
non-moving party.

1 § Sheriff Hawley’s decision to appoint high-level investigators regarding the potential
2 policy violations and false statements rather than allowing the matters to be
3 resolved at “the lowest supervisory level” (Dkt. # 70-2 at 13);

4 § an email from Sheriff Hawley to Jan Smith proposing questions for the candidates,
5 including “Assuming all the facts to be true as have been reported, what is your
6 opinion of the [union’s] vote to support Mr. Jay Wallace’s appeal of his
7 termination for dishonesty and shirking his duty?” (Dkt. # 69-4 at 11);

8 § an email from Jan Smith to Sheriff Hawley stating “RE Mystery Weekend Are
9 you kidding, that got delegated too. Laura - Sheriff in waiting – is doing it . . . I
10 can see it now in 2010, it will be Mauck v. Price . . . oh and Jay Wallace with the
11 Green Party . . . You thought things could get worse!” (Dkt. # 69-4 at 4); and

12 § the testimony of Sgt. Norrie that Jan Smith “made it very clear that Deputy Jay
13 Wallace was a threat, that they would do anything in their power to make sure
14 that he would not have that ability to become a future sheriff, and actually went to
15 some extreme measures to see that that would cease and desist for him running for
16 that elected position.” (Dkt. # 70-4 at 25).

17 Viewing this evidence in light most favorable to plaintiffs, the Court finds that plaintiffs have
18 met their initial burden of raising a triable issue regarding whether Deputy Wallace’s candidacy
19 was a motivating factor in the decision to terminate him.

20 Defendants, however, have conclusively shown that, even in the absence of the
21 protected activity, they would have reached the same decision. As discussed above, the CJTC
22 has already determined that Deputy Wallace’s conduct in February 2006 justified his
23 termination and decertification, regardless of any First Amendment activity in which he had
24 engaged. Even if plaintiff’s candidacy played a “substantial” part in the decision to terminate
25 his employment, it would not amount to a constitutional violation justifying remedial action.

26 A rule of causation which focuses solely on whether protected conduct played a
 part, “substantial” or otherwise, in a decision not to rehire, could place an
 employee in a better position as a result of the exercise of constitutionally
 protected conduct than he would have occupied had he done nothing. The
 difficulty with the rule enunciated by the District Court is that it would require
 reinstatement in cases where a dramatic and perhaps abrasive incident is
 inevitably on the minds of those responsible for the decision to rehire, and does
 indeed play a part in that decision even if the same decision would have been

1 reached had the incident not occurred. The constitutional principle at stake is
2 sufficiently vindicated if such an employee is placed in no worse a position than if
3 he had not engaged in the conduct. A borderline or marginal candidate should not
4 have the employment question resolved against him because of constitutionally
5 protected conduct. But that same candidate ought not to be able, by engaging in
6 such conduct, to prevent his employer from assessing his performance record and
7 reaching a decision not to rehire on the basis of that record, simply because the
8 protected conduct makes the employer more certain of the correctness of its
9 decision.

10 Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285-86 (1977). See also
11 Hartman v. Moore, 547 U.S. 250, 260 (2006) (the First Amendment activity must be the but-for
12 cause of the discharge, otherwise “the claim fails for lack of causal connection between
13 unconstitutional motive and resulting harm, despite proof of some retaliatory animus in the
14 official’s mind.”). Given the CJTC’s conclusive ruling that termination of Deputy Wallace’s
15 employment was justified by his non-First Amendment conduct, Deputy Wallace cannot
16 establish that defendants’ explanation was merely pretextual.

17 Defendants’ motion for summary judgment with regards to plaintiffs’ First
18 Amendment claim is therefore GRANTED.

19 **F. Arbitration Award Procured by Fraud or Misconduct Claim**

20 Plaintiffs allege that the arbitration award and CJTC decision were procured by
21 fraud, corruption, or undue means. Dkt. # 49 at 14-20. For the reasons discussed above in
22 Section II, plaintiffs have failed to produce evidence from which one could conclude that fraud
23 or misconduct justify vacation of the prior decisions.

24 Defendants’ motion for summary judgment regarding plaintiffs’ challenges to the
25 arbitration and administrative decisions is GRANTED.

26 **G. Tortious Interference**

Plaintiffs allege that Deputy Wallace “had a business and political office
expectancy with the probability of future economic benefit, i.e., to become the next elected
Sheriff of Island County at the general election in November 2006.” Dkt. # 49 at 20. It is hard
to fathom how anyone could have a legitimate “business expectancy” in a political office, and

1 plaintiffs have not shown that Deputy Wallace had any right to expect that he would be the
2 Republican nominee, much less the eventual winner of the general election.

3 Plaintiffs have also failed to show that they had a reasonable business expectancy
4 in Deputy Wallace's "employment contract with Island County as a sheriff's deputy" or that
5 defendants improperly interfered with that expectancy. Dkt. # 49 at 23. Deputy Wallace's
6 employment could be terminated "for good cause in accordance with Civil Service Rules." Dkt.
7 # 70-2 at 18. The CJTC has already determined that Deputy Wallace falsified his February 14th
8 report and was justly terminated and stripped of his peace officer certification.

9 Defendants' motion for summary judgment regarding plaintiffs' tortious
10 interference claim is GRANTED.

11 **H. Intentional and Negligent Infliction of Emotional Distress**

12 Plaintiffs claim that defendants' investigation and termination of Deputy Wallace
13 was "done intentionally or recklessly, was extreme and outrageous, and caused the plaintiffs to
14 suffer severe emotional distress and health problems." Dkt. # 49 at 23. Based on the facts
15 known at the time (including Deputy Wallace's responses to the dispatcher and Ms. Walker's
16 subsequent allegations), the initiation of an investigation regarding Deputy Wallace's handling
17 of the 911 calls was eminently reasonable. When Deputy Wallace filed an official report that
18 not only contradicted his contemporaneous statements but was also inconsistent with other
19 evidence obtained during the criminal investigation of Mr. Friar, an investigation into possible
20 false swearing became justified. Neither of these investigations was recklessly undertaken or
21 could be considered extreme or outrageous. Deputy Wallace's termination following findings
22 that he had, indeed, breached Sheriff's office policy and violated the law was not "so
23 outrageous in character, and so extreme in degree, as to go beyond all possible bounds of
24 decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."
25 Birklid v. Boeing Co., 127 Wn.2d 853, 867 (1995) (quoting Grimsby v. Samson, 85 Wn.2d 52,
26 59 (1975)). Such internal accountability, far from being outrageous, should be lauded.
Plaintiffs have failed to make out a claim for intentional infliction of emotional distress.

1 The law of Washington is extremely generous in providing recovery for the
2 negligent infliction of emotional distress as long as that distress is associated with physical
3 impact and injury. The state courts are less generous, and have expressed significant concerns,
4 regarding claims for emotional distress in the absence of physical harm, however. In their
5 attempts to limit the scope of liability for negligent infliction of emotional distress, the state
6 courts have developed certain tests and prerequisites designed to weed out dubious claims. One
7 of the requirements imposed on a claimant who was not physically injured is that he prove his
8 emotional distress through medical evidence. See Hegel v. McMahon, 136 Wn.2d 122, 132-35
9 (1998). Plaintiffs have not met this requirement and have, therefore, failed to raise a genuine
10 issue of material fact regarding a critical element of their negligent infliction of emotional
11 distress claim.

12 Defendants' motion for summary judgment regarding plaintiffs' emotional
13 distress claim is GRANTED.

14 **I. Defamation and False Light**

15 "To establish liability for defamation there must be a false and defamatory
16 statement concerning another, an unprivileged communication to a third party, fault amounting
17 at least to negligence on the publisher's part, and either actionability of the statement or special
18 harm caused by the publication." Eastwood v. Cascade Broadcasting Co., 106 Wn.2d 466, 470
19 (1986). "The degree of fault is negligence for a private person and actual malice for a public
20 figure or public official." Corbally v. Kennewick Sch. Dist., 94 Wn. App. 736, 741 (1999).
21 Deputy Wallace's conduct was that of a public figure or official at all times relevant to his
22 claims, and he must show that defendants acted with actual malice. In addition, statements that
23 communicate ideas or opinions cannot support a defamation claim: false opinions are simply
24 not actionable. Schmalenberg v. Tacoma News, Inc., 87 Wn. App. 579, 591 (1997). A false
25 light claim involves many of the same elements. Representations regarding plaintiff are
26 actionable when defendant publicizes a matter that places another in a false light if (a) the false
light would be highly offensive to a reasonable person and (b) the actor knew of or recklessly

1 disregarded the falsity of the publication and the false light in which the other would be placed.
2 Eastwood, 106 Wn.2d at 470-71.

3 For purposes of their defamation and false light claims, plaintiffs object to
4 defendants' statements to the arbitrator that Ms. Walker had been raped and beaten because of
5 the implication that her injuries were a direct result of Deputy Wallace's failure to perform his
6 duties. As discussed above, however, there was ample evidence to support Ms. Walker's
7 allegations of physical and sexual abuse on the night of February 7th. The fact that the assault
8 was never proven in court does not mean that it did not occur. Deputy Wallace has not shown
9 that Ms. Walker's story (as repeated by defendants) was false or that defendants' recitation of
10 the story was the result of actual malice or reckless disregard. Thus, these statements are not
11 actionable defamation or false light. In addition, the statements were made in the context of an
12 arbitration proceeding. Under both Ninth Circuit and Washington law, such statements are
13 entitled to immunity in order to protect the decision-making process from reprisals by
14 dissatisfied participants. See Wasyl, Inc. v. First Boston Corp., 813 F.2d 1579, 1582 (9th Cir.
15 1987) (comparing the functions and decision-making process of arbitration proceedings before
16 applying arbitral immunity); Story v. Shelter Bay Co., 52 Wn. App. 334, 338 (1988) (finding
17 that an absolute privilege is appropriate where the presiding authority has "the power to
18 discipline as well as strike from the record statements which exceed the bounds of permissible
19 conduct").

20 Plaintiffs also object to allegedly defamatory statements Sheriff Hawley made to
21 KIRO-TV and other members of the press. Dkt. # 80 at 25. The exhibits to which plaintiffs
22 cite contain a videotaped interview and numerous newspaper articles. The latest article that
23 attributes statements to Sheriff Hawley is dated February 3, 2007.¹⁹ Dkt. # 74-1 at 16.

24 ¹⁹ The Court notes that there is no evidence that the statements attributed to Sheriff Hawley in
25 the February 3, 2007, article were made by Sheriff Hawley at the time the article was published.
26 Based on the contents of the articles, it appears that any objectionable statements were actually made
between February and April 2006. See Dkt. # 72-1; # 74; # 74-1.

1 Plaintiffs did not file a notice of claim with Island County until March 11, 2009, and did not
2 initiate this action until May 11, 2009.

3 Claims for defamation or false light must be brought within two years from when
4 the claims accrue. RCW § 4.16.100(1); Eastwood 106 Wn.2d at 474. Generally, a cause of
5 action accrues when the party has a right to apply to a court for relief. U.S. Oil & Refining Co.
6 v. Dep't of Ecology, 96 Wn.2d 85, 91 (1981). Although the discovery rule delays accrual of a
7 cause of action until plaintiff knew or should have known the essential elements of his claim
8 (Allen v. Wash., 119 Wn.2d 753, 758 (1992)), plaintiffs offer no theory or explanation that
9 would excuse their lack of action for more than two years after publication of Sheriff Hawley's
10 last objectionable statements. The statements were made to the press, they were not
11 confidential or otherwise undiscoverable with the exercise of reasonable diligence, and they
12 were published in the media more than two years before the claims were brought.

12 Defendants' motion for summary judgment regarding plaintiffs' claims for
13 defamation and false light is GRANTED.

14 CONCLUSION

15 For all the foregoing reasons, plaintiffs' motion for partial summary judgment
16 (Dkt. # 83) is DENIED. Defendants' motion for summary judgment (Dkt. # 58) is GRANTED.
17 The Clerk of Court is directed to enter judgment in favor of defendants and against plaintiff.

18
19 Dated this 13th day of December, 2011.

20 

21 Robert S. Lasnik
22 United States District Judge
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